VIRGINIA LAW REGISTER.

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INDIRECT CONTEMPTS — LEGISLATION IMPAIRING POWER OF COURTS TO PUNISH.—Few lawyers of the State will be disposed to dissent from the decision of Judge Whittle, of the Circuit Court of Lynchburg, announced within the past few days, declaring unconstitutional the recent Act of the Virginia legislature by which it is sought to restrict the courts in their traditional and salutary jurisdiction to enforce obedience to their lawful orders, and to punish contempts.

The Act in question reads as follows (Acts 1897–8, p. 548):

"The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases, which are hereby declared to be direct contempts, all other contempts being indirect contempts:

"*First.* Misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

"*Second.* Violence or threats of violence to a judge or officer of the court or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court.

"*Third.* Misbehavior of an officer of the court in his official character.

"*Fourth.* Disobedience or resistance of an officer of the court, juror or witness to any lawful process, judgment, decree or order of the said court.

"When the court adjudges a party guilty of a direct contempt it shall make an entry of record, in which shall be specified the conduct constituting such contempt and shall certify the matter of extenuation or defence set up by the accused, and the evidence submitted by him and the sentence of the court.

"SUBSECTION.

"*Proceedings in cases of indirect contempt.*—Upon the return of an officer on process, or upon an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person may be arrested and brought before the court, and thereupon a written accusation, setting forth, succinctly and clearly the facts alleged to constitute such contempt shall be filed, and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter. A copy of this order shall be served upon the accused, and upon a proper showing the court may extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt.

"After the answer of the accused, or if he fail or refuse to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed according to the rules governing the trial of criminal cases, and the accused shall be entitled to compulsory process for his witnesses and to be confronted with the witnesses against him.

"Such trial shall be by the court, or upon the application of the accused, a trial by a jury shall be had, as in any case of a misdemeanor.

"If the jury find the accused guilty of contempt they shall fix the amount of his punishment by their verdict.

"The testimony taken on the trial of any case of contempt shall be preserved on motion of the accused, and any judgment of conviction therefor may be reviewed on writ of error from the circuit court having jurisdiction, if the judgment is by a county court, or on writ of error from the Supreme Court of Appeals, if the judgment is by a circuit or corporation court. In the appellate court the judgment of the trial court shall be affirmed, reversed, or modified as justice may require. If the writ of error to the judgment of a county court is refused by the circuit court having jurisdiction, the application may then be made to the Court of Appeals."

The purpose of the Act is to secure to the defendant a jury trial, in cases of indirect contempts, and to prohibit the court itself from vindicating the sanctity of its own process—in other words, to compel the court to submit the question of its outraged dignity to a jury, with all the delays and incongruities incident thereto.

In the case mentioned, the accused had, by means of a false telegram to his counsel, secured continuance of a case pending against him in the circuit court. Upon being summoned to show cause why he should not be punished for contempt, he demanded a trial by jury, under the foregoing statute.

Judge Whittle held the Act unconstitutional, as an infringement by one co-ordinate branch of the government upon the inherent and essential power of the other—a power not conferred by the legislature and therefore not subject to be impaired or taken away by it. No written opinion was filed.

We heartily concur in the following opinions expressed by leading members of the Lynchburg bar, upon the decision, and published in the Lynchburg *News:*

R. G. H. Kean, Esq.:

"I am asked whether, in my opinion, the Act of Assembly, approved February 26, 1898, to amend the section 3768 of the Code of Virginia in relation to contempts and to define what are direct and what are indirect contempts, and to provide a mode of procedure in such class of cases—is or is not valid.

"In view of the general principles of such authorities as in a limited time I

have had opportunity to consult, I strongly incline to the opinion that so much of the Act in question as undertakes to prescribe the manner in which what are called indirect contempts shall be dealt with, giving to the party proceeded against the peremptory right of a jury trial, such jury having authority to prescribe punishment, if any is awarded, is of more than doubtful validity.

"The right and power of courts of record to punish all sorts of contempts, is generally conceded to be inherent. It is not given by legislation, but belongs as a necessary and inseparable power incident to the judiciary. All courts of record had it when our government was founded, and the separation of governmental powers into departments was made and recognized.

"As this power is not conferred by the legislative department, so it is logically held to be one which the legislature cannot take away or abridge.

"In so far, therefore, as the Act in question gives to the party in (indirect) contempt the power peremptorily to elect to be tried by a jury, and gives to the jury the power to determine both whether a contempt has been committed and, if so, what punishment shall be inflicted, it seems to me plain that the inherent and essential powers of the judiciary department are curtailed in a manner beyond the authority of the coördinate legislative department.

"Out of a multitude of authorities, bearing more or less directly on the question, I refer to the following, in which many others are cited: *United States* v. *Hudson*, 7 Cranch, 34; *Burke* v. *Territory* (1894), 37 Pac. 833; *Hale* v. *State* (1896), 45 N. E. 200."

Charles M. Blackford, Esq.:

"Judge Whittle's course in refusing to delegate to a jury the mode of punishing Carter for contempt of the mandate of his court, meets the hearty approval, I believe, of our whole bar. It vindicates the dignity of the courts and strikes a blow at a legislative interference which undertakes to rob the courts of the power to enforce their orders.

"A circuit court is established by the Constitution of the State just as is the legislature, and while the legislature may regulate its jurisdiction, it cannot take from it the power to enforce orders within the range of its recognized authority. To do this would be to so rob it of its vitality as to practically destroy its existence, and to permit this power in the legislature would be to give to one department of the government, established by the Constitution, the power to destroy another and coördinate department, which cannot, in my opinion, be done.

"The Act of the Assembly which undertakes to give this right of trial by jury in certain cases of contempt is, I believe, taken from the statute-book of Kansas, the experimental ground for all novel and vicious legislation. If wrongs exist in Kansas which require such a remedy, they do not and never will exist in Virginia. No one demanded such legislation, and it is to be hoped that the courts of the land will declare it void."

Randolph Harrison, Esq.:

"The Act construed by Judge Whittle makes all cases of disobedience to the orders of the court, except the disobedience of an officer, juror, or witness, indirect contempts, punishable only on written accusation, and triable by a jury on written

application of the accused. The power of a court to enforce its orders by summary punishment is therefore taken away, and all power of the Court of Appeals to enforce obedience to its orders is practically destroyed, for the reason that it cannot impanel a jury. The Act is not a mere limitation upon the jurisdiction of the courts, but an invasion of their inherent power to enforce obedience. This power exists independently of legislative authority, and it is not competent for the legislature to abridge or destroy it; such a power is essential to the existence of a court. Judge Whittle's decision was an application of this principle, and I think his position abundantly sustained by the authorities."

The vicious character of such legislation will be more readily appreciated when it is pointed out that the Act practically deprives the court of enforcing its own affirmative orders. Imagine a decree directing the defendant to abate a nuisance—to deliver up negotiable paper for cancellation—to settle his accounts as a fiduciary—followed by a positive and contemptuous refusal. The court must prepare a written accusation in the nature of an indictment and set a time for the hearing; the hearing is finally had before the jury—the court, acting in the undignified attitude of judge on the bench and counsel for itself before the jury; and, finally, the jury, whose sympathies and prejudices, political and otherwise, have been worked upon by astute counsel, eloquent on the subject of "government by injunction," retire and bring in a verdict of not guilty. What becomes of the order, disobedience to which constituted the contempt? How is it to be enforced? And what position does the court occupy toward the world? What respect would the people thereafter have for the courts?

Nor is the position relieved if the jury impose any punishment less than confinement until the defendant obey the order. The very nature of a court, in Anglo-Saxon jurisprudence, implies a power to enforce obedience to its process, without appeal to any other tribunal. Such jurisdiction is inherent; it is not conferred by legislation; and where the court is a creation of the Constitution and not of the legislature, its jurisdiction to punish for contempt cannot be affected by legislation.

As said by the Supreme Court of Mississippi, in *Watson* v. *Williams*, 36 Miss. 341, the power to fine and imprison for contempt "from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments or decrees, would be a disgrace to the legislation and a stigma upon the age which invented it."

The precise question as to the right of the legislature to limit the powers of constitutional courts over the subject of contempts, is discussed with much learning, and on a full review of authorities, in *State* v. *Frew*, 24 W. Va. 416 (49 Am. Rep. 257). The conclusion reached is that "the power is inherent in courts of justice to summarily punish constructive as well as direct attempts. And in this country, where the courts are, in the divisions of power by the constitutions of the several States, constituted a separate and distinct department of government, clothed with jurisdiction, and not expressly limited by the Constitution in their powers to punish for contempt, the inherent power that is thus necessarily granted them cannot be taken away by the legislative department of the government."

To the same effect in *State* v. *Morrill*, 16 Ark. 384, in which it is held that "the legislature may regulate the exercise of, but cannot abridge the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic frame-work of both Federal and State institutions, and a favorite theory in the governments of the American people."

The same view is presented in *In re Shortridge*, 99 Cal. 526 (37 Am. St. Rep. 78). In answer to the contention that the power to punish contempts was limited by the statute, the court said: "We know of no decision which supports the proposition contended for. No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act—whether committed in or out of its presence—which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities based upon the fiction that the majesty of the king, represented in the person of the judges, is always present in the court. It is founded upon the principle—which is coeval with the existence of the courts, and as necessary as the right of self-protection—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure, and enlarge the power, but it cannot, without trenching upon the

constitutional powers of the court and destroying the autonomy of that system of checks and balances, which is one of the chief features of our triple-department form of government, fetter the power itself."

Other cases, maintaining substantially similar views, are: *Little* v. *State*, 90 Ind. 338 (46 Am. Rep. 224); *State* v. *Judge*, 45 La. Ann. 1250 (40 Am. St. Rep. 282).

The distinction between courts created by legislation and those deriving their powers from the constitution, in the matter of having their powers to punish for contempt restricted by statute, is recognized by the Supreme Court of the United States in *Ex parte Robinson*, 19 Wall. 505.

The learned editor of the American State Reports discusses this subject in a monographic note to *Percival* v. *State* (Neb.), 50 Am. St. Rep. 572–3, and announces his conclusion in the following language: "As to contempts not committed in the presence of the court, and which are sometimes called constructive contempts, the claim has been made that there is no inherent power in the courts to consider or punish them, and statutes have sometimes been enacted seeking to fetter or destroy such power. There is not, in our judgment, any essential difference between what are thus denominated constructive contempts and those contempts committed in the presence of the court, and sometimes called direct contempts, in respect to the inherent power of the courts to protect themselves and the administration of justice by the punishment of offenders; and the legislature has as little authority to destroy, or substantially impair, the power in one case as in the other."

RECENT VIRGINIA LEGISLATION.—Notwithstanding much adverse criticism which our recently adjourned legislature incurred, its work was by no means wholly bad. There were many good lawyers in the body who did not allow politics to lead them away from their more serious duties as legislators.

As an addendum to some of the more important acts heretofore published in full in these pages, we append a list of other important statutes passed. The list is by no means exhaustive, but may serve a useful purpose in putting practitioners on notice:

To permit the extension of the statutory limitation of mortgages, deeds of trust and other liens, under sec. 2935 of the Code, by endorsement on the deed book where recorded.—(Acts '97–8, p. 516.)

To require commissioners, in reporting accounts of liens in chancery suits to subject real estate, to report an account of delinquent taxes.—(p. 514.)

Making sellers of farm or garden seed bound by all representations as to quality, and regulating measure of damages.—(p. 510.)

Abolishing the rule as to retroactive effect of confessed judgments and vacation decrees, established in *Hockman* v. *Hockman*, 93 Va. 455.—(pp. 507-8.) See 3 Va. Law Reg. 462.

Requiring third persons claiming property in possession of defendant, to give suspending bond, else officer may levy.—(p. 505.) See 3 Va. Law Reg. 547.

Making it the duty of a personal representative to have a copy of the will recorded in every county or corporation in which there is real estate of which the testator died seised or possessed.—(p. 492.)

To prevent the adulteration of flour.—(p. 493.)

Giving a creditor, who has a lien on an undivided interest in real estate, the right to compel partition.—(p. 488.) See 2 Va. Law Reg. 423.

To prevent the garnishment of an infant's wages by a creditor of the parent.—(p. 599.)

Authorizing the entry of satisfaction of liens after twenty years, and other provisions with respect to entry of satisfaction of liens.—(p. 594.) See *Turnbull* v. *Mann*, 3 Va. Law Reg. 445.

Making it the duty of the clerk to issue, as of course, execution on all judgments for money after adjournment of the court.—(p. 586.)

Abolishing the rule of *Newberry* v. *Williams*, 89 Va. 298, as to necessity of motions for new trial, as condition precedent to writ of error.—(p. 754.)

Requiring distress warrants to be returned to the clerk's office.—(p. 755.)

Extending the practice of hearing chancery causes in vacation; requiring chancery causes, "as far as practicable," to be heard in the court-room and not in chambers.—(p. 755.)

Making husband and wife competent witnesses, "for or against" each other in civil cases (with exceptions), and "in behalf of" each other in criminal cases.—(p. 753.)

Authorizing married women to sue in their own names in cases where now required to sue by next friend.—(p. 744.)

Authorizing conditional pardons by the governor to convicts in the penitentiary.—(p. 732.)

Authorizing joint action against drawer and endorsers of protested checks. See 2 Va. Law Reg. 384.

Giving jurisdiction to the county court for the trial of motions to recover money or specific personal property, not exceeding $100 in amount or value.—(p. 673.)

To prevent assignments to non-residents, of claims against laborers, resident of this State, for purpose of garnishment in another State so as to deprive them of their exemption.—(p. 667.) See 1 Va. Law Reg. 241.

To provide for judgment by default on warrants for money before a justice.—(p. 662.)

Authorizing an appeal by the Commonwealth in criminal cases, where the statute under which the accused is prosecuted, is declared unconstitutional. See monographic note to *State* v. *Solomons*, 27 Am. Dec. 471–480.—(p. 622.)

Compelling fire insurance companies to return a portion of the premiums, in certain cases—apparently intended to apply chiefly to policies in which the "three-quarter loss clause" is inserted.—(p. 636.)

Repealing sec. 3433 of the Code, requiring clerks to file copies of decrees amongst the papers of chancery suits.—(p. 637.)

"A TRUE GUN."—In *White* v. *Com.*, 29 Gratt. 824, it was held that an indictment for burning a "certain outhouse, commonly called a barn, or tobacco house, with stable attached, belonging to James W. Gunn," was good, although endorsed, by mistake, "A true gun.—A. T. Towree, foreman." And now comes Mr. L. E. Payne, in an address before the Oklahoma Bar Association, entitled "Humors of the Practice" (reported in *The American Lawyer* for April, 1898), with this statement:

"I was once greatly impressed with the bewildering effect of female beauty on a susceptible juryman. Among the cases before the grand jury was one in which a Miss Gun, a very beautiful woman, was a witness. When the indictments were returned into court they were all signed: 'A true gun.—J. Robinson, foreman.' It is needless to say that Mr. Robinson had been smitten by the unusual charms of the pretty witness, whose surname he had thoughtlessly used, instead of the formula.—'A true bill.'"

Can it be that the Virginia case has been paralleled in far off Oklahoma, substituting the beautiful Miss Gun for plain James W. Gunn, and changing the foreman's name from A. T. Towree to J. Robinson? Or has Mr. Payne, with poetic license, embellished the facts of the Virginia case in order to enrol it among the "Humors of the Practice," claiming to have been an eye-witness of the "bewildering effect of female beauty," to give an appearance of reality to the anecdote? No woman figures in the Virginia case, but the Court says prosaically: "There can be no doubt but the grand jury, or rather the foreman, in endorsing the bill a 'true gun' meant a 'true bill,' being probably led into the mistake by the fact that the indictment, on which the endorsement was made, charged that the house burned was the property of a man named Gunn, who was thus, no doubt, the prosecutor."

C. A. G.

DIVORCE FOR "INFIDELITY."—Our neighbor across the border, the *West Virginia Bar*, is not only always full of entertaining matter, but it is doing excellent work in endeavoring to raise the professional standard in that State, both from an educational and moral standpoint. We hope the better class of lawyers composing the bar of West Virginia will second what the *Bar* terms its "house-cleaning campaign." As an illustration of the needs of a higher educational standard, the *Bar* publishes the following extract from a bill for divorce, recently filed in the Circuit Court of Greenbrier county:

"The plaintiff further charge that this defendent is an infidel and don't believe in a Supreme being, and that by his unbelief causes great trouble and annoyance to this plaintiff until she cannot possibly live with this defendent as her husband. The plaintiff further charges that her said husband, this defendent, does not believe that there is any God. The plaintiff is informed and charge that she is entitled to a divorce *Avinculo Matrimonii* on the sole grounds of the infidelity of her said husband that under our laws infidelity alone is sufficient grounds for the absolute divorce, but in addition to the said infidelity all the other charges herein made are true. . . . . .

"The plaintiff therefore prays that she may be granted an absolute divorce from this defendent, from the bonds of matrimony heretofore existing between this plaintiff and defendent, and that she may be forever divorced from this defendent.

"The plaintiff further prays that the defendent may be summoned to answer this bill fully and that she have adjudged to her costs in this case expended, including attorney's fee and all other costs in this case expended, that she may have all other further, general and special relief that her case may require or equity appertains.

"May spay issue, &c.

"Plaintiff will ever pray."

The confused idea of the pleader as to "infidelity" as a ground of divorce, is somewhat akin to that of the young lawyer who, representing a quack charged with criminal abortion, based his defense on that section of the statute of parol agreements which provides that "no person shall be held to answer for the debt, default or *miscarriage* of another, unless the contract be in writing."

THE LAWFUL FENCE AGAIN.—Some time ago we called attention to the unsatisfactory condition of the statute law defining a lawful fence in Virginia, by reason of several bungling amendments which had been made to section 2038 of the Code. Another amendment of that section, adopted by the legislature of 1897–8, seems to make the situation worse. The new Act defines with great particularity the essentials of a lawful fence, but it makes no reference to the prio

amendments, and, while purporting to amend section 2038, the title is "An Act to amend and re-enact section 2038 of the Code, defining a lawful fence for *the county of Accomac!*" The body of the Act makes no reference to Accomac county!

Our query, propounded in 3 Va. Law Reg. 463, as to what constitutes a lawful fence in Virginia, seems further from solution than ever.

THE family of Judge Burks have recently erected a granite shaft over his grave. The inscription is:

EDWARD CALOHILL BURKS.

BORN MAY 20, 1821.
DIED JULY 4, 1897.

A LAWYER OF PROFOUND AND ACCURATE LEARNING;
A JUDGE OF THE SUPREME COURT OF APPEALS OF VIRGINIA;
A REVISER OF THE CODE OF VIRGINIA OF 1887;
FOUNDER AND EDITOR OF THE VIRGINIA LAW REGISTER.

A PATRIOTIC CITIZEN; A SAGACIOUS LAW-MAKER;
A WISE AND JUST JUDGE; A SAFE COUNSELLOR;
A TENDER AND AFFECTIONATE HUSBAND;
A KIND AND LOVING FATHER;
A TRUE FRIEND.

HE WAS FAITHFUL IN EVERY RELATION OF LIFE. HE DIED AS HE HAD LIVED—A MAN OF STAINLESS INTEGRITY, A CHRISTIAN GENTLEMAN.